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THE PRESENT STATUS OF THE ATTORNEY IN CIVIL SERVICE*

RALPH F. FUCHS**

A COMPREHENSIVE Civil Service system for substantially all of the legal positions in the Federal Government¹ went into operation on July 1, 1941. For two years the system was under the direction of the Board of Legal Examiners, established in the Civil Service Commission by Executive Order No. 8743 of April 23, 1941, which also brought most of the positions effected into the classified, competitive civil service. The Board was directed to proceed "in consultation with" the Commission. The system passed fully under the Commission on July 1, 1943, after funds had been withheld from the Board by the Congress for the fiscal year 1944, pending final legislative action with respect to the continuance of the Board. A bill² to establish the Board by statute was introduced by Congressman Ramspeck in January, 1943 and passed the House in April of that year. It has not been reported out by the Senate Committee on Civil Service.

The Independent Offices Appropriation Act for 1945 omitted an appropriation for continuing the legal examining work and, as adopted, contained the following provision:³

No part of the appropriations herein made available to the Civil Service Commission shall be available for the salaries and expenses of the Legal Examining Unit in the Examining and Personnel Utilization Division of the Commission * * *.

* The present article attempts simply to state the situation which has arisen with respect to the civil service for legal or attorney positions in the Federal Government, with particular reference to those matters which are of interest to the incumbents of such positions. No attempt will be made to review the background of the legal examining system which prevailed from July 1, 1941 to June 30, 1944 or to give an account of the procedures which were followed. These are covered in articles by the same author, which have appeared in the Journal of the Bar Association of the District of Columbia for February, 1944 (Vol. 11, No. 2) and the Public Personnel Review for July 1944 (Vol. 5, No. 3).

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¹ The Assistant United States Attorneyships were numerically the most important class of positions which continued to be excluded.

² H. R. 1025, 78th Congress.

³ Public Law 35—78th Congress, p. 4.

The legal examining unit referred to was the Legal Examining Section, consisting of the former staff of the Board, which the Commission had established. The Commission also established a Committee on Legal Personnel, consisting of the former members of the Board, to advise it in carrying the system forward. The Commission, however, exercised administrative control. Since it was the intention of Congress to terminate the legal examining system, the Commission discontinued the Legal Examining Section and the Committee as of June 30, 1944, and has not established any other organization for administering legal examining procedures.

The civil service system for legal positions, which the Board of Legal Examiners established and which was carried forward by the Civil Service Commission with some changes, thus continued in operation for three fiscal years. The numerous appointments which were made necessary by expansion of the Government in war time and by the rapid turnover of personnel occasioned by service in the armed forces, were made under the procedures established by the Board. Appointments prior to March 16, 1942 resulted in the bestowal of civil service status upon the appointees; those made on and after that date resulted in war service status. In addition, civil service status was conferred upon approximately 3,000 incumbents of legal positions who had served varying lengths of time in the Government prior to July 1, 1941, who were recommended for status by the employing agencies and who completed noncompetitive examinations, pursuant to the Ramspeck Act of November 26, 1940 and Executive Order No. 8743. Civil service status previously existing in a number of agencies was, of course, recognized.

The status which has resulted from the appointments made and from the actions taken with respect to incumbents is secured to the individuals involved, without danger that it will be revoked. However, continuance of the major benefits which civil service status and war service status confer upon the incumbents of positions as such, is dependent upon the continuance of the positions in the classified civil service,⁴ since the incumbent of a position

⁴ The phrase "classified civil service" does not mean subject to the Classification Act for salary purposes. It is an elliptical expression which signifies the group of positions which is subject to the examination procedures laid down pursuant to the Civil Service Act. The Civil Service Rules spell out these procedures for normal times; the Civil Service Commission's War Service Regulations prescribe the procedures now in effect.

which is not in the classified civil service, even if he possesses civil service status or war service status, is in the same situation with regard to tenure and at least some other incidents of Government employment as a non-civil service employee.

Thus far, the legal positions which formerly came under the attorney civil service system have not been removed from the classified civil service. Therefore the situation of those who held these positions prior to July 1, 1944 remains unchanged. It was possible to permit this group of positions to remain in the classified civil service notwithstanding the inability of the Civil Service Commission to continue a legal examining system, because Executive Order No. 9063, which authorized the system of war service appointments and war service tenure, authorized durational appointments to be made to positions in the classified civil service according to such procedures as the Commission might prescribe, thus temporarily suspending the normal Civil Service Rules to the extent necessary to accommodate the emergency procedures.

Acting under the power thus conferred upon it, the Commission on July 14, 1944,⁵ prescribed that legal positions in the classified civil service shall be filled by the several appointing agencies under procedures which conform to the War Service Regulations which the Commission administers in respect to other classes of positions. Consequently, each appointing agency is constituted a civil service examining agency for the purpose of selecting attorneys for war service appointments to its legal staff. Appointees under this system receive the same status as other war service appointees.

Because of the provision of the Appropriation Act which forbids the Commission to use money for legal examining purposes, the Commission is unable to see to it that the appointing agencies observe the prescribed procedures. Observance of the prescribed procedures is to some extent also required by statute, however, since the Veterans Preference Act of 1944⁶ requires that numerical ratings be assigned in the examination of applicants for positions and that specified methods of selection for appointment be followed.

Under the provisions of the Veterans Preference Act applicable to positions in the classified Civil Service all applicants for positions are to be examined and graded. Disabled veterans, the wives of those physically disqualified for appointment, and the

⁵ Departmental Circular No. 497.

⁶ Public Law 359, 78th Congress.

widows of ex-servicemen are to be given a ten percent credit and all other veterans of wars a five percent credit in examinations. In the case of positions paying under \$3,000 and some of those in the higher grades, ten-point preference applicants who qualify are to be placed at the top of the list, ranked in accordance with their grades in the examinations; but this requirement does not apply to professional and scientific positions paying over \$3,000 a year. The Civil Service Commission is required to certify from the top of the list so constructed for each position or class of positions, when requested by an appointing officer, sufficient names to permit the consideration of three persons for each vacancy to be filled. Reasons must be given if a veteran is passed over for appointment or if a person whose name has been certified is regarded as unsatisfactory and substitution of another name is sought.

In view of the Civil Service Commission's present inability to expend funds for examining and classifying lawyers, the appointing agencies are now expected to follow equivalent procedures on their own account with respect to legal positions. The War Service Regulations, however, do not require the full procedures to be followed unless there is a surplus of applicants for positions. Several agencies are establishing committees or setting up other machinery for the selection of attorneys and there is also a movement under way among a number of agencies to cooperate with regard to application forms and some elementary requirements for professional experience for the various grades of positions. A committee of the Council on Personnel Administration has interested itself in the problem and has recommended certain methods and standards to the appointing agencies.

The method of selecting attorneys which thus has come into operation probably cannot outlast the period during which war service appointments continue to be made, since the Civil Service Act contemplates that the Commission shall "have control of" and "supervise" examinations under the Civil Service Rules.⁷ It is problematical, therefore, whether permanent provision for the selection of attorneys under the Civil Service Act will be made before the present system comes to an end at or before the end of the war. There are two possible ways in which a permanent system might be established: (1) adoption of a statute or Executive Order setting up a legal examining system

⁷ Sec. 2, *Third*, of the Act, 5 U.S.C. Sec. 633(3).

and (2) withdrawal by the Congress through a supplemental appropriation, or omission from future appropriation acts, of the present prohibition against use of funds by the Civil Service Commission for legal examining purposes, provided legal positions are not removed from the classified civil service before such action is taken.